

Publisher's Note

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TECHNOLOGY CONTRACTING

This publication provides comprehensive, invaluable information relating to transactions and agreements that technology-oriented companies enter into throughout their life cycle. Each chapter includes a discussion on the law that is relevant to negotiating and drafting particular types of agreements, and practical suggestions for drafting and negotiating clauses and provisions within the agreements. The publication includes key contracts and transactions that are of interest to technology-oriented companies.

This release features updates to the Updates to Appendix 5 — Quantum Table — Remedies for Patent Infringement in Chapter 12 (Dispute Avoidance and Resolution). This release also features updates to Appendix 19 to Chapter 13 (E-Commerce and Internet Agreements) — Administrative Monetary Penalties and Monetary Penalties Pursuant to Undertaking under *Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities* (CASL). This release also includes the addition of the General Data Protection Regulation of the European Parliament and of the Council of the European Union, effective May 25, 2018 as Appendix 21 to Chapter 13 (E-Commerce and Internet Agreements).

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Highlights

- **Quantum Table — Damages for Patent Infringement — Damages — Profits on Lost Sales** — A number of products were commonly sold with GrenCo drives. These products were not marketed independently of the drives. It was common for oil producers to purchase a surface equipment “package” from one manufacturer, although producers also purchased different components from different manufacturers. If compensation is not provided for such add-on items, then the patentee is not being put in the position that they would have been in but-for the infringement (resulting in less than perfect compensation). If the plaintiffs can show, on a balance of probabilities, that such sales would have been made by the plaintiffs in the but-for world, then this is a loss for which they should be compensated. This approach is consistent with the limited Canadian case law on the topic, and the judge rejected the requirement suggested by the defendants that such convoyed sales must have no function independent of the patented object. A common sense view of causation indicates that these products were convoyed sales that, on a balance of probabilities, would have been made by the plaintiffs but-for the infringement by the defendants. The purchase of “associated products” was up to the customer and that certain products could be interchangeable. However, associated products were often (but not always) purchased with a drive. The judge determined that Cohen’s model was capable of covering off the concern that not all sales of drives would include convoyed products by making a deduction from his estimated loss. Cohen’s approach of looking at the average revenue GrenCo would have received on the sale of a new drive and the historic average contribution margin was more reasonable than the defendants’ approach. Cohen’s approach takes into account the fact that producers sometimes sourced “convoy” products from other manufacturers. Cohen estimated that there were 1,051 lost units of convoy sales. Accepting that not all drive sales lead to sale of associated product but such was often the case, there must be a deduction from Cohen’s estimated sales. The evidence suggests that convoyed sales happened the majority of the time but not always, and taking the “broad axe” approach, the judge used the mid-point between 50% and 100% to find that 75% of drive sales lead to convoy sales. Using Cohen’s Schedule, the lost profit on convoyed sales was estimated as \$750,000: *Grenke v. DNOW Canada ULC*, 2018 CarswellNat 2713, 2018 FC 564 (F.C.).
- **General Data Protection Regulation of the European Parliament and of the Council of the European Union** — The General Data Protection Regulation (“GDPR”) came into effect on May 25, 2018. Although a European regulation, it affects businesses that operate out of a European signatory state marketing to a foreign country such as Canada, or a foreign business marketing to and operating within a European signatory state. Any company that seeks to advertise to a European population must comply with

the requirements set out in the GDPR. The Regulation aims to protect people's information when it is shared with businesses. The failure to comply with the GDPR can lead to severe consequences. The GDPR establishes a standard of care that business must meet. Failure to satisfy this standard, will expose business to not only fines but legal actions.

